subject of illegal transactions — for example, insurance on a stock of liquor to be sold without a license [2] — the contract is against public policy. It may be objected that this is punishing a crime without the usual safeguards of criminal trials, and that it confers a wholly undeserved benefit on the defendant. But to deny the right to enforce an insurance contract of this sort tends to deter the promotion of such kinds of business, while a contrary policy would indirectly encourage the very thing forbidden by the law. On the other hand, when the property is only remotely connected with the illegal transaction, the policy is enforceable.[3] The difference between these two classes of contracts is one merely of degree, and the more objectionable the transaction, the further its taint will extend to connected matters. Not unnaturally, therefore, the same state of facts may be regarded as falling on different sides of the line in different jurisdictions.[4] If the analogy of ordinary contract law were strictly followed, the result would be that even where only a small part of the property was to be the subject of illegal transactions, the entire contract of insurance would be held unenforceable.[5] Nevertheless, when the question arises, the courts will almost certainly enforce such a contract, at least as to the untainted portion. The policy of protecting the insured would to that extent probably outweigh the policy of indirectly discouraging the illicit traffic.

Permission to make an illegal use is an attempt by the underwriter to waive that form of illegality as a defense. But since illegality is a defense given for the protection not of the underwriter but of the public, illegal use, like the related defense of want of insurable interest,[6] cannot be waived, a recent Canadian case to the contrary notwithstanding. *Morin* v. *Anglo-Canadian Fire Ins. Co.*, 12 Western L. R. 387 (Alberta, Trial, Dec. 2, 1909). An attempted waiver makes only more certain the fact that the policy was really intended to protect an illegal business.

Many policies contain an express condition of avoidance in case the property insured is used for unlawful purposes. The violation of this condition at any time during the term of the policy prevents a recovery as to subsequent loss.[7] In the absence of an express condition, illegality affects the validity of an insurance policy *ab initio* if at all. Hence the fact that the property is actually used illegally is of no consequence, if the illegality was not contemplated at the time of contracting.[8] Conversely, if the illegality was contemplated at the time of contracting, there can be no recovery, though the illegal use was discontinued before the loss, or had nothing to do with the cause of the fire.[9]

PROOF OF CONTINGENT CLAIMS AGAINST A BANKRUPT ESTATE. — To what extent, if at all, contingent claims may be proved against a bankrupt

[2] Kelly *v.* Home Ins. Co., 97 Mass. 288.

[3] Phenix Ins. Co. *v.* Clay, 101 Ga. 331.

[4] Insurance on furniture in a bawdy house is held valid. Conithan *v.* Royal Ins. Co., 91 Miss. 386. *Contra*, Bruneau *v.* Laliberté, Q. R. 19 C. S. 425.

[5] See WILLISTON'S, WALD'S POLLOCK, CONTRACTS, 483.

[6] Agricultural Ins. Co. *v.* Montague, 38 Mich. 548.

[7] Kelly *v.* Worcester Mutual Fire Ins. Co., 97 Mass. 284.

[8] Carrigan *v.* Lycoming Fire Ins. Co., 53 Vt. 418; Erb *v.* German-American Ins. Co., 98 Ia. 606.

[9] Lawrence *v.* National Fire Ins. Co., 127 Mass. 557 n.

estate, has been a very troublesome question, and has received a great variety of judicial answers. The early English statutes made express provision for the proof of fixed claims only, so that under them contingent claims were held not provable.[1] An act passed in 1825[2] allowed contingent debts to be proved. But by narrow construction the courts took a distinction between contingent "debts" and contingent "liabilities"; the latter were held not to be within the statute, on the ground that no debt would arise until the amount owed became fixed, which could be only upon the happening of a contingency.[3] Even under a subsequent statute[4] expressly providing that contingent liabilities should be provable, the courts failed to make much advance.[5] In the United States the Bankruptcy Acts of 1841[6] and 1867[7] provided for the proof of contingent claims, and their allowance on becoming absolute, or at a present valuation. This legislation received interpretation varying from the strictness of the English decisions[8] to a liberality which allowed proof of nearly all contingent claims.[9]

Instead of clearing up the matter, the Bankruptcy Act of 1898[10] entirely omitted any express provisions for the proof of contingent claims; as a result the authorities in this country are now in worse confusion than ever. It has been held under the Act, that by necessary implication and on the authority of the early English decisions, no contingent claims are provable.[11] The question arose once in the Supreme Court, but was not squarely decided, the court merely holding that the claim in question was not capable of valuation.[12] Following, however, several decisions in the lower federal courts,[13] it has recently been decided in New York that the liability of a bankrupt indorser of a promissory note, made before the filing of the petition but not due until afterwards, though within the time allowed for the proof of claims, is provable. *Cohen* v. *Pecharsky*, 121 N. Y. Supp. 602 (Sup. Ct.). The result seems eminently desirable, though it can be reached only by an extremely liberal construction of clause 4 of section 63 a, which allows proof of claims "founded upon a contract express or implied." If proof of such liabilities is to be allowed, it would seem that all contingent debts which are capable of valuation should be provable.[14] It is possible

[1] Tully *v.* Sparkes, 2 Ld. Raym. 1546. In a few cases where the debt was secured by a bond, of which the penalty had been forfeited before bankruptcy, proof was allowed. See *Ex parte* Winchester, 1 Atk. 116.

[2] 6 GEO. IV, c. 16, § 56.

[3] Atwood *v.* Partridge, 4 Bing. 209; Boorman *v.* Nash, 9 B. & C. 145. It was also required that the present value of the claim should be ascertainable with practical certainty. Green *v.* Bicknell, 8 A. & E. 701.

[4] ACT OF 1849, 12 & 13 VICT. c. 106, § 178.

[5] See Amott *v.* Holden, 18 Q. B. 593; Kent *v.* Thomas, L. R. 6 Ex. 312; ROBSON, BANKRUPTCY, 7 ed., 273; WILLISTON, CASES ON BANKRUPTCY, 491, note.

[6] 5 U. S. STAT. AT L. 444, § 5.

[7] 14 U. S. STAT. AT L. 526, § 19.

[8] See French *v.* Morse, 2 Gray (Mass.) 111; Glenn *v.* Howard, 65 Md. 40.

[9] See Jemison *v.* Blowers, 5 Barb. (N. Y). 686; Shelton *v.* Peace, 10 Mo. 473; LOWELL, BANKRUPTCY, 124 *et seq.* Of course all contingent claims, not becoming absolute, had to be capable of valuation. Riggins *v.* Magwire, 15 Wall. (U. S.) 549.

[10] 30 U. S. STAT. AT L. 544, § 63; 3 U. S. COMP. STAT. (1901) 3418.

[11] Goding *v.* Roscenthal, 180 Mass. 43; In the Matter of McCauly & Sons, 2 Nat. Bankr. N. 1085. See 14 HARV. L. REV. 372.

[12] Dunbar *v.* Dunbar, 190 U. S. 340. See 22 HARV. L. REV. 605.

[13] Moch *v.* Market St. Nat'l Bank, 107 Fed. 897; *In re* Smith, 146 Fed. 923. *Contra*, *In re* Schaefer, 104 Fed. 973.

[14] But it is probable that a higher degree of certainty in valuing a contingent claim

to infer that Congress did not intend entirely to exclude proof of contingent debts, since the Act makes express provision for the liquidation of unliquidated claims against the bankrupt,[15] and for the proof of a debt by a surety of the bankrupt in case the creditor fails to prove it.[16]

The unsatisfactory condition of the law on this subject might have been avoided by adopting the provisions in the present English Bankruptcy Act,[17] which provide in the broadest possible language for the valuation and proof of contingent claims of every description. Under it the bankrupt is discharged from every liability, unless the claim is submitted for proof and declared by the court to be incapable of valuation.[18] This accomplishes, as nearly as is possible, what should be the principal objects of bankruptcy legislation; namely, to relieve the debtor of every existing liability, and to enable as many creditors as possible to receive dividends.

RECENT CASES.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF AGENT FOR REFUNDING MONEY DUE THIRD PERSON. — The plaintiff sent to the defendant for collection a check which had been fraudulently drawn on the A bank by A's cashier, as the plaintiff probably knew. The A bank paid the check, but shortly afterward, on discovering the fraud, demanded back the money, and the defendant repaid it. *Held*, that the defendant is liable to the plaintiff for the amount repaid. *Monongahela Nat. Bank* v. *First Nat. Bank*, 75 Atl. 359 (Pa.).

If an agent receives money or property for his principal, he is generally estopped to deny his principal's title. *Roberts* v. *Ogilby*, 9 Price 269. This is true even if it in fact belongs to a third person, who could have demanded it back from the principal, for an agent is not allowed to set up a *jus tertii* unless the right has been asserted against him. *Day* v. *Southwell*, 3 Wis. 657. But if, upon demand, he holds the property for the true owner, or returns it to him, he has a good defense against his principal. *Biddle* v. *Bond*, 6 B. & S. 225; *Robertson* v. *Woodward*, 3 Rich. (S. C.) 251. For a refusal to surrender to the true owner on demand would be a conversion by the agent. *Doty* v. *Hawkins*, 6 N. H. 247. In the principal case, as the plaintiff probably knew of the cashier's wrongful act, he would not be entitled to recover or retain the money as against the A bank. *Stainback* v. *Bank of Va.*, 11 Gratt. (Va.) 269; *Amidon* v. *Wheeler*, 3 Hill (N. Y.) 137. Accordingly the decision seems erroneous, in denying to the agent a justification for refunding to the aggrieved bank.

ATTACHMENT — EFFECT OF LEVY BY MORTGAGEE ON MORTGAGED PROPERTY. — A chattel mortgagee attached the mortgaged goods, which were in the possession

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would be required than under the earlier acts. See *In re* Pettingill & Co., 137 Fed. 143.

[15] § 63 b.

[16] § 67 i. This section, however, merely insures to the surety that the original debt will be proved against the bankrupt. It does not enable him to prove his contingent claim on the bankrupt's implied contract of indemnity; and unless he can do so under § 63, the bankrupt is liable on it after his discharge. Smith *v.* McQuillin, 193 Mass. 289.

[17] ACT OF 1883, 46 & 47 VICT. c. 52, § 37. This substantially follows the ACT OF 1869, 32 & 33 VICT. c. 71, § 31.

[18] Fothergill *v.* Hardy, 13 App. Cas. 351. If the court decides that the claim is not capable of valuation, it is not provable and therefore not discharged. Robinson *v.* Ommanney, 23 Ch. D. 285.